Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1468

FIRST NATIONAL BANK OF PEORIA,
Petitioner,

vs.

GAREY R. CHILDS, On Behalf of Himself and All Others Similarly Situated,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Garey R. Childs, on behalf of himself and all others similarly situated ("consumer"), respondent, respectfully submits this brief in opposition to a petition for Writ of Certiorari filed by petition First National Bank of Peoria ("bank") to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on August 16, 1978, rehearing denied, October 24, 1978, reversing the judgment of the United States District Court for the Southern District of Illinois, entered September 6, 1977. The case below is one of nineteen consolidated Truth in Lending actions and was entitled *Basham* v. *Finance America Corp.*, 583 F. 2d 918 (7th Circuit, 1978).

I. OPINIONS OF THE COURTS BELOW

Consumer accepts the bank's statement of the lower court opinions.

II. JURISDICTIONAL STATEMENT

Consumer accepts the statement of jurisdiction offered by bank.

III. STATUTES AND REGULATIONS INVOLVED

Consumer accepts the bank's statement of statutes and regulations involved to the extent that they deal with the "dragnet" or over-broad security interest issue. As noted below, references to Illinois' Confession of Judgment Act are irrelevant.

IV. QUESTIONS PRESENTED FOR REVIEW

1. Whether the bank's over-broad (and therefore unlawful) claim to consumer's after-acquired consumer goods (in violation of § 9-204(2) of the Illinois Uniform Commercial Code) violated the Truth in Lending Act and Regulation Z.
2. Whether the bank could, in good faith, rely on a pamphlet published by the Federal Reserve Board in 1969 ("What You Should Know About Truth In Lending") which was later substantially repudiated by the Federal Reserve Board itself.

The bank's reference to issues involving its confession of judgment clause is factually incorrect; the Childs contract was not in default when this suit was filed and the bank never confessed a judgment against Childs. The confession of judgment issue was never raised below and played no part in either the decision of the District Court or of the Seventh Circuit.

V. STATEMENT OF THE CASE

On July 25, 1977, Garey R. Childs filed a class action complaint against First National Bank of Peoria in the United States District Court for the Southern District of Illinois. He alleged that jurisdiction was conferred by the Truth in Lending Act, 15 U. S. C. § 1640(e). He said that the class was composed of himself and all others who had borrowed funds from the bank during the year immediately preceding the filing of his complaint; provided that the borrowers executed a note and security agreement within the State of Illinois on a form identical to the one executed by him, and that the form contained a security agreement granting to the bank a security interest in consumer goods other than accessions acquired more than 10 days after the bank made the loan. Childs sought certification of the class under Rules 23(a) and 23(b)(3) of Federal Rules of Civil Procedure, alleging that he was a proper representative of the class and that his claims were typical of all other members of it.

In January, 1977, Childs bought a new 1977 GMC van for his personal use and financed it at First National Bank in Peoria. He signed the bank's standard motor vehicle installment contract which on its face and above the place for consumer's signature provided:

> This loan is secured by a security interest created under this Security Agreement in the property described above which security interest may attach to any additions or accessions thereto. In addition to the foregoing security the Holder has a security interest for the payment of all obligations due it in all property and assets of Debtor(s) which are in the possession or control of Holder and a right of set-off or lien on any deposit or sums now or hereafter owed by Holder to Debtor(s). This Security Agreement will secure future or other indebtedness and will cover after-acquired property.

On the document's reverse an additional security agreement appears which reads:

> Debtor(s) agrees that Holder shall have, and there is hereby created in favor of Holder a security interest in the Collateral described herein (including all accessories, parts and equipment now or hereafter at any time installed in or affixed thereto or used in connection therewith) . . .

Section 9-204(2) of the Uniform Commercial Code, Illinois Revised Statutes, 1975, Chapter 26, ¶ 9-204(2), reads as follows:

> No security interest attaches under an after-acquired property clause to consumer goods other than accessions (§ 9-314) when given as additional security unless the debtor acquires rights in them within 10 days after the secured party gives value.

The credit extended by the bank to Childs was a consumer loan not under an open end credit plan (a so-called "closed end" loan). The specific issue in this case is whether the loan made to Childs violated 15 U. S. C. § 1639(a)(8) and Regulation Z, § 226.8(b)(5).

15 U. S. C. § 1639(a)(8) reads in pertinent part as follows:

> Any creditor making a consumer loan . . . shall disclose . . .:
>
> 8. A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

Regulation Z, § 226.8(b)(5) requires the creditor to disclose:

> A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates . . . If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

Finally, Regulation Z, § 226.8(a)(1) requires all disclosures to be made on the note or other instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature ("the single document rule").

Briefly stated, the bank, on page one of its contract disclosed that it had a security interest in any additions or accessions, and that the security agreement would cover after-acquired property. The claim of security in "accessions" is clearly lawful under Illinois and federal law; the claim of security in "additions" is not. The bank's broad assertion that the security interest "will cover after-acquired property" violates Illinois and federal law.

On the reverse of the bank's contract (in violation of the single document rule), the bank claimed a security interest in all accessories, parts and equipment now or hereafter at any time installed in, or affixed to the vehicle, or used in connection with it. Thus, the bank's disclosures on the face of the contract misled the consumer, because what was disclosed on page one was different than the security claimed on the reverse.

VI. REASONS FOR GRANTING THE WRIT

The bank's overbroad claim to the consumer's after-acquired consumer goods clearly violates U. C. C. § 9-204(2). That section of the Uniform Commercial Code, in force in Illinois since 1962 (and which is the law of 48 other states as well), contains a specific prohibition against broad claims to after-acquired property in a consumer's hands. 15 U. S. C. § 1639 (a)(8) and Regulation Z, § 226.8(b)(5) both require a creditor to make truthful disclosures, neither understating nor overstating the extent of the collateral claimed.

What the bank did in this case was to:

1. Make an overbroad claim to after-acquired property in violation of Illinois law.
2. Disclose a portion of the claimed security on the face of the contract and then add another and separate claim on the reverse to additional securitiy (all accessories, parts and equipment now or hereafter at any time

installed in or affixed to the vehicle, or used in connection with it).

3. Violate the single document rule of Regulation Z, § 226.8(a)(1).

This case presents no new or novel issues of federal or state law. The after-acquired property issue and its interplay with the Truth in Lending Act has been litigated many times: *Basham* v. *Finance-America Corp.*, 583 F. 2d 918 (7th Circuit, 1978); *Tinsman* v. *Moline Beneficial Finance Company*, 531 F. 2d 815 (7th Circuit, 1976); *Murphy* v. *Beneficial Finance Company*, 443 F. Supp. 463 (S. D. Ohio, 1976); *Pollock* v. *General Finance Corp.*, 535 F. 2d 295 (5th Circuit, 1976), reheard and affirmed 552 F. 2d 1142 (5th Circuit, 1977), cert. den., 434 U. S. 891 (1977); *Jacklitch* v. *Redstone Federal Credit Union*, 463 F. Supp. 1124 (N. D. Alabama, 1979).

Gennuso v. *Commercial Bank and Trust Company*, 566 F. 2d 437 (3rd Circuit, 1977), holds that all Truth in Lending disclosures must be made on the same side of the document and is the leading exposition of the single document rule. The bank's disclosures are on both sides of the document, and its claims to collateral are on the reverse are far more comprehensive than those on page one.

Ambiguities in disclosure statements or unclear disclosures are to be resolved against the lender. *Sneed* v. *Beneficial Finance Company of Hawaii*, 410 F. Supp. 1135 (Dist. Hawaii, 1976). In *Starks* v. *Orleans Motors, Inc.*, 372 F. Supp. 928, 932 (E. D. La., 1974) affirmed mem., 500 F. 2d 1182 (5th Circuit, 1974) the court said:

> Where the nature of an act is remedial as here, it should be construed liberally in an attempt to provide the remedy, not to avoid it.

Finally, the bank argues that it "relied" on the Federal Reserve Board's pamphlet "What You Ought to Know About Truth in Lending". Three comments are appropriate. First, the bank initially raised this issue on appeal, not in the trial court

and the Seventh Circuit rejected the argument. Second, Federal Reserve Board Letter 983, December 30, 1975 (CCH Consumer Credit Guide, ¶ 31,323) provides:

> It must be emphasized, however, that staff's position on this issue rests not on Exhibit E of the pamphlet but on Regulation Z itself. As indicated in Letter 829, we do not believe that a creditor can automatically comply with the Regulation by using a sample form, regardless of whether the terms of the creditor's own credit plan coincide with those described in that form. For example, if a creditor discloses that the Rule of 78's will be used to compute finance charge rebates and State law does not permit the use of that rebate method in that type of credit transaction, this disclosure would clearly violate § 226.8(b)(7), despite the fact that the creditor's disclosure exactly mirrors the language of Exhibit E.

Third, the pamphlets was issued by the Federal Reserve Board in 1969. This case was filed in 1977. The plethora of after-acquired property cases which were decided in the intervening period should have been ample notice to the bank that claimed reliance on the Board's early pronouncement was misplaced.

VII. CONCLUSION

The Seventh Circuit's decision is correct. The bank violated Illinois law, the Truth in Lending Act and Regulation Z in a number of important ways. Its contract clearly misled the consumer. There are no novel issues to be decided by this court, and for these reasons the bank's petition for a writ of certiorari should be denied.

Respectfully submitted,

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